UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs,

vs.

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

Case No. 2:07-cv-13164
Hon. Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

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PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS'

MOTION TO BIFURCATE DAMAGES DISCOVERY AND TRIAL

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CONCISE STATEMENT OF THE ISSUE PRESENTED

Whether the Court should deny Defendants' Motion to Bifurcate Damages Discovery and Trial where, 1) the issues of liability and damages are inextricably intertwined, 2) many of the same witnesses will testify as to damages and liability; 3) defendants have willfully delayed production of documents relevant to damages and now complain of insufficient time to complete such production, and 4), defendants have failed to demonstrate prejudice or that bifurcation would serve the interests of judicial economy.

Plaintiffs answer: "No."

CONTROLLING AUTHORITIES

17 U.S.C. § 504

Fed. R. Civ. P. 42

Brad Ragan, Inc. v. Shrader's Inc., 89 F.R.D. 548 (S.D. Ohio 1981)

Computer Assocs. Int'l, Inc. v. Simple.com, Inc., 47 F.R.D. 63 (E.D.N.Y. 2007)

Cranston Print Works Co. v. J. Mason Products, 1988 U.S. Dist. LEXIS 18000 (S.D.N.Y.).

Cravens v. County of Wood, Ohio, 856 F.2d 753 (6th Cir. 1988)

Data Gen. Corp. v. Grumman Sys. Support Co., 795 F. Supp. 501 (D. Mass. 1992).

Ellingson Timber Co. v. Great N. Ry. Co., 424 F.2d 497 (9th Cir. 1970)

Gafford v. Gen. Elec. Co., 997 F.2d 150 (6th Cir. 1993)

Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517 (5th Cir. 1981)

Hines v. Joy Mfg. Co., 850 F.2d 1146 (6th Cir. 1988)

Helminski v. Ayerst Labs., 766 F.2d 208 (6th Cir. 1985)

Intersong-USA, Inc. v. CBS, Inc., 1985 U.S. Dist LEXIS 21588 (S.D.N.Y.).

K.W. Muth Co., Inc. v. Bing-Lear Mfg. Group, LLC, 2002 U.S. Dist. LEXIS 14926 (E.D. Mich.)

Laitram Corp. v. Hewlett-Packard Co., 791 F. Supp. 113 (E.D. La. 1992)

Moss v. Associated Transp., Inc., 344 F.2d 23 (6th Cir. 1965)

Real v. Bunn-O-Matic Corp., 195 F.R.D. 628 (N.D. Ill. 2000)

Shultz v. Butcher, 24 F.3d 626 (4th Cir. 1994)

Svege v. Mercedes-Benz Credit Corp., 329 F.Supp.2d 283, 285 (D. Conn. 2004)

UMG Records, Inc. v. Norwalk Distribs., Inc., 2003 U.S. Dist. LEXIS 26304 (C.D. Cal.).

United States v. Hall, 2000 U.S. App. Lexis 170 (6th Cir.)

Zomba Enterprises, Inc. v. Panorama Records, 491 F.3d 574 (6th Cir. 2007)

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO BIFURCATE DAMAGES DISCOVERY AND TRIAL

I. INTRODUCTION

Bifurcation is only appropriate in certain circumstances where it serves the interests of judicial economy, convenience, or to avoid prejudice, and only when issues or claims are in fact separate. Here, liability and damages are by nature intertwined and it would thus create far more burden and adversely affect judicial economy to bifurcate. Further, defendants can show no prejudice, and bifurcation would prejudice plaintiffs. This is, at base, a motion for the benefit of Aftermath, which seeks to indefinitely delay damages production at great cost to this Court and the plaintiffs. For these reasons, defendants' motion should be denied.

II. FACTUAL BACKGROUND

Plaintiffs filed a complaint in this Court on July 30, 2007, alleging Apple, Inc. ("Apple") had violated its copyrights in 93 compositions written and composed, in part, by Marshall Mathers, III, p/k/a "Eminem" (the "Eminem Compositions") by offering said compositions to end users through its iTunes Music Store. (Doc. No. 1). Plaintiffs' Complaint further alleges that while Apple purported to do so pursuant to a license from Universal Music Group ("UMG"), plaintiffs never authorized UMG to issue licenses for the Eminem Compositions for this purpose and thus UMG had no right to grant such licenses. (*Id.* ¶ 12). Aftermath Records d/b/a Aftermath Entertainment ("Aftermath"), which is a joint venture between UMG and others, subsequently intervened in this action. (Doc. No. 8).

Plaintiffs served their First Set of Requests for Production of Documents on both Apple and Aftermath (collectively, "defendants") on February 12, 2008. (Doc. No. 38-3). Defendants served written responses on March 20, 2008. (Doc. No. 33-6). The parties held a meet and confer concerning these responses (among other things) on April 9, in which counsel for defendants advised that defendants might seek to bifurcate damages and liability. (Declaration of Marc Guilford, attached hereto as Exhibit A, ¶¶ 2-3 ("Guilford Decl.")). Counsel for plaintiffs advised that they would oppose a motion to bifurcate, and also that a motion to bifurcate filed so late in the case would be prejudicial to plaintiffs' prosecution of the case. (Guilford Decl. ¶ 4).

Since that time, plaintiffs have taken the depositions of Rand Hoffman, Lisa Rogell, Peter Paterno, Chad Gary, Todd Douglas, Fred Eisler, and James Harrington and have served notices of Rule 30(b)(6) depositions on both Aftermath and Apple. (Exhibits B & C).

II. ARGUMENT

A. Bifurcation is the exception, not the rule

Federal Rule of Civil Procedure 42(b) governs bifurcation and separation of issues for trial. It provides:

> For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

"Defendants, as the party seeking bifurcation, have the burden of proving the bifurcation will satisfy the expressed objectives of the rule, including furtherance of convenience, avoidance of prejudice, or enhancement of expedition and economy." 8 Moore's Federal Practice § 42.20[7][a] (2008).

The decision to separate or refuse separation is committed to the trial court's discretion. *Moss v. Associated Transp., Inc.*, 344 F.2d 23, 25 (6th Cir. 1965). The Sixth Circuit has cautioned, however, bifurcation should only be used when the court concludes that such action really furthers convenience or avoids prejudice. *Id.* at 26; *see also K.W. Muth Co., Inc. v. Bing-*

Lear Mfg. Group, L.L.C., 2002 U.S. Dist. LEXIS 14926, at *8 (E.D. Mich.) (denying defendant's motion to bifurcate liability and damages in a patent suit involving infringement of five patents and construction of almost 40 claims).

"Separate trials are the exception, not the rule, and [the moving party bears] the burden of demonstrating that they will be prejudiced if a separate trial is not granted." *Cranston Print Works Co. v. J. Mason Prods.*, 1988 U.S. Dist. LEXIS 18000, at *8 (S.D.N.Y.). A single trial "tends to lessen the delay, expenses and costs to all concerned and the courts have emphasized that separate trials should not be ordered unless such a disposition is clearly necessary." *Intersong-USA, Inc. v. CBS, Inc.,* 1985 U.S. Dist LEXIS 21588, at *3 (S.D.N.Y.).

"[E]ven if bifurcation might somehow promote judicial economy, courts should not order separate trials when bifurcation would result in unnecessary delay, additional expense, or some other form of prejudice." *Real v. Bunn-O-Matic Corp.*, 195 F.R.D. 628, 621 (N.D. Ill. 2000) (quoting *Laitram Corp. v. Hewlett-Packard Co.*, 791 F. Supp. 113, 115 (E.D. La. 1992)).

B. Bifurcation of Liability and Damages is inappropriate where it would Require Duplication of Witnesses and Evidence

Defendants argue that damages and liability are separate in copyright cases and thus appropriate for bifurcation. (Doc. No. 38-1). However, plaintiffs have not made an election of remedies and may seek statutory damages for willful infringement. Proof of willfulness and liability are linked. *See Data Gen. Corp. v. Grumman Sys. Support Co.*, 795 F. Supp. 501, 503 (D. Mass. 1992). Thus, judicial economy would be served by allowing the trial to proceed whole.

Under the Copyright Act, a plaintiff may elect either the copyright owner's actual damages and any additional profits of the infringer or statutory damages at any time before final judgment is entered. 17 U.S.C. § 504. In cases where the copyright owner proves the infringement was willful, statutory damages may be awarded in amounts up to $150,000 per infringement. 17 U.S.C. § 504(c)(2). To prove willfulness, a plaintiff must show that the copyright law supported plaintiff's position so clearly that the defendants must be deemed as a matter of law to have exhibited a reckless disregard for the plaintiff's property rights. *Zomba Enterprises, Inc. v. Panorama Records*, 491 F.3d 574 (6th Cir. 2007). A plaintiff may prove willful infringement by showing that the defendant knew that its actions might infringe copyright, and continued to so infringe, or passed off cease and desist letters as a nuisance. *See, e.g., Video Views v. Studio 21*, 925 F.2d 1010, 1021 (7th Cir. 1991) (overruled on other grounds, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 550-51 (1994)); *Rodgers v. Eighty Four Lumber Co.*, 623 F. Supp. 889 (W.D. Pa. 1985) (defendant failed to heed notification letters or to properly negotiate for an adequate license); *E Beats Music v. Andrews*, 433 F. Supp. 2d 1322 (M.D. Ga. 2006) (defendant failed to heed communication from rights-holder regarding unauthorized use).

Proof of liability and willfulness is inextricably intertwined in this case, even more so than in the average copyright case. If statutory damages are sought, Plaintiffs will prove that Aftermath (through UMG) knew it did not have the right to license the Eminem Compositions for permanent download, yet licensed the songs to Apple anyway, and that Apple knew it did not have the right to continue offering the songs on its service (due, in part, to plaintiffs' demands that Apple cease and desist its infringing conduct, *see* Doc. No. 1 ¶ 14) yet continued to do so. This proof will necessarily involve testimony of the same Aftermath and Apple witnesses on the same subjects as the issue of liability.

For example, the individuals who negotiated and drafted Eminem's artist recording agreements with Aftermath will surely have information as to Aftermath and UMG's decision to purport to license the Eminem Compositions to Apple. Other UMG witnesses may have knowledge as to the course of dealing between UMG and plaintiffs with regard to obtaining licenses for the Eminem Compositions, including plaintiffs' refusal to execute licenses for digital downloads and whether and why UMG might have deviated from its usual practice with regard to its purported licenses to Apple.

Similarly, individuals at Apple will likely have information both as to the negotiation of Apple's agreements with UMG (i.e., what decision were made with respect to obtaining the needed licenses for compositions), and regarding Apple's conduct thereafter, including its actions upon receipt of plaintiffs' cease and desist demand.

In fact, Defendant Aftermath Records has argued the relatedness of proof of liability and proof of willfulness in copyright cases in the past. Defendants Aftermath Records (and UMG Recordings) sued Norwalk Distributors, Inc. and related companies for copyright infringement related to Norwalk's importation and sale of certain copyrighted recordings, including those of Eminem. *UMG Records, Inc. and Aftermath Records v. Norwalk Distributors, Inc.*, 2003 U.S. Dist. LEXIS 26304, at *4 (C.D. Cal.).

Norwalk, like the Defendants in the instant case, argued that a finding of no liability would render damages discovery moot. *Id*. The court found that bifurcation would do little to save judicial economy and noted, "as [Aftermath and UMG] suggest, much of the same evidence presented in the liability trial would be required in the damages phase to show willfulness." *Id.* at *6 (internal citation omitted). The same logic applies to the case at bar. Evidence of willfulness and damages are related, and bifurcating the trial will result in Plaintiffs presenting the same evidence at two trials.

Liability and defendants' actual profits are also intertwined. As noted by defendants, "Eminem is one of the most popular recording artists in the world today. His songs have generated tremendous sales for Aftermath and Apple." (Doc. No. 38, p. 22). Plaintiffs intend to show that the potential for (and realization of) "tremendous" profits through offering the Eminem Compositions for permanent download on Apple's iTunes Music Store was a motivating factor for defendants' infringing activities. In order to do so, plaintiffs have requested information regarding defendants' profits from the Eminem Compositions, which defendants have refused to provide.

Defendants argue that the witnesses plaintiffs have already deposed do not have knowledge "of the kind of cost and income issues that relate only to Plaintiffs' claim for damages," and that bifurcation would be appropriate because these depositions "will focus almost entirely (if not exclusively)" on liability issues. (Doc. No. 38 at 4). As an initial matter, plaintiffs note that it would be an exercise in futility to attempt to depose individuals concerning documents that have not been produced. In addition, defendants themselves are uncertain whether these individuals have knowledge as to damages, and have presented no evidence that they do not. Finally, as described above, questions of liability and damages are not separate in this case, and bifurcation would result in these individuals being called as witnesses multiple times.

C. The Judicial Efficiencies Suggested by Defendants are Speculative and Illusory

1. **Other Courts have specifically rejected bifurcation of liability and damages solely because Defendant may prevail on the issue of liability.**

Defendants argue that judicial economy will be served because, if Plaintiffs fail to prove liability, discovery on damages will be unnecessary. (*See* Doc. No. 38 at 16-18).

Logically, this is true for every case; however, courts have consistently rejected this rationale, standing alone, as a reason to bifurcate liability and infringement trials. *See e.g.*, *Computer Associates International, Inc. v. Simple.com, Inc.*, 47 F.R.D. 63, 65 (E.D.N.Y. 2007); *Svege v. Mercedes-Benz Credit Corporation*, 329 F.Supp.2d 283, 285 (D. Conn. 2004) ("[I]f there is a verdict against Defendants of liability, bifurcating liability and damages will likely end up being more inefficient than presenting all issues and all evidence to the jury at one time."); *Brad Ragan, Inc. v. Shrader's Incorporated*, 89 F.R.D. 548, 550 (S.D. Ohio 1981); *Real*, 195 F.R.D. at 623 (N.D. Ill. 2000) ("[T]his Court will not preclude a plaintiff from proceeding in the normal course of a trial and present evidence on both liability and damages merely because a defendant may ultimately prevail.").

No court has ever adopted a "likelihood of success on the merits" test for bifurcating liability and damages seemingly urged by Defendants here. Indeed, Defendants' position on the merits has been fully briefed for summary judgment, and, should summary judgment be denied, Defendants have made no showing why they should be treated differently than other copyright defendants. A defendant's success on the merits would always obviate the need for damages discovery, but if such hypothetical success were enough to bifurcate liability and damages, bifurcation would be the rule, and not the exception. As noted above, it is not. Defendants have not shown that the damages at issue in this case are any more difficult to calculate than in any other copyright case, and even in complex cases, liability and damages are not bifurcated absent a showing that the case is exceptional. *K.W. Muth Co., Inc.*, 2002 U.S. Dist. LEXIS 14926 at *8.

2. Bifurcation will delay the final result of this action, prejudice the Plaintiffs and waste judicial resources

Far from increasing judicial economy, bifurcation will delay the outcome to this action, increase Plaintiff's costs, and waste this Court's resources. The lion's share of savings bifurcation might provide would go to Aftermath, who would be permitted to delay conducting damages discovery until after a finding of liability. Defendant Apple admits that it can easily produce the damages figures that Plaintiffs have requested. (Doc. No. 38 at 7, n5).

Against these "savings" are the costs to the Court and the plaintiffs. The Court, as described above, would be forced to conduct two separate trials using many of the same witnesses. Plaintiffs would be prejudiced by the increased cost of conducting a second trial, as well as the delay in obtaining relief.

Further, if Defendants are found liable, they will be given a weapon that no other copyright defendant normally has. Defendants, knowing that a second trial will be expensive for Plaintiffs, have an increased incentive to protract discovery for the second trial in the hope of obtaining settlement on favorable terms. Plaintiffs' hard-won judgment will be worthless until they complete another long, expensive round of discovery and trial.

Before a finding of liability, the defendants have the incentive to use their resources efficiently, as they may be found not liable. After a finding of liability, though, delays hurt the plaintiff far more than the defendant: the longer and more cumbersome that bifurcated damages discovery is for plaintiffs, the better the terms of settlement defendants can hope to get.

D. Copyright Actions Are Not Especially Suited for Bifurcation

Defendants argue that copyright actions present a special case where bifurcation is especially appropriate, citing repeatedly to Professor Goldstein's treatise. (See Doc. No. 38, pp. 2, 12-18, *citing* 3 Goldstein on Copyright § 16.5). However, defendants fail to disclose what Goldstein himself acknowledges: "courts rarely order bifurcation [in copyright cases]." Goldstein § 16.5, p. 16:30 (citing cases). "Courts typically deny motions for a bifurcated trial in copyright cases on the ground that liability and damages issues are closely intertwined." *Id.* at 16:31.

Nor do the cases cited by defendants provide much support for their position. *Swofford v. B&W* was a patent case, and although the court did opine about bifurcation of "*validity, title, infringement and damages*" in copyright actions, it did not rule on that issue. 336 F.2d 406, 415 (5th Cir. 1964). Further, the court cautions that "[t]here is an important limitation on ordering a separate trial of the issues under Rule 42(b): the issue to be tried must be so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* In *Apple Computer v. Microsoft Corp.*, the court bifurcated *sua sponte* with no discussion of its reasoning or analysis. 821 F. Supp. 616, 630 (N.D. Cal. 1993).

E. There Has Been Ample Time for Damages Discovery

Defendants only claim that damages discovery will burden Aftermath, not Apple. (Doc. No. 38, p. 13 n5). Whatever burden Aftermath might actually suffer from producing this indisputably relevant information regarding their profits (and thus the damages plaintiffs might claim) is due to their own dilatory conduct. As noted above, the discovery requests for damages information cited in defendants' motion (Doc. No. 38, pp. 5-6) were served on February 12, 2008, yet defendants waited until May 9, less than one month before the discovery deadline of June 2, to file the instant motion.

Defendants now complain that "[w]ith just over [sic] a month of discovery remaining, it will be virtually impossible for Aftermath to complete the damages discovery requested by Plaintiffs based on the sheer volume of analysis that must be done…." Defendants received these requests in February and evidently chose to do nothing in response for two and a half months. Such foot-dragging cannot be used to justify a request for bifurcation.

In addition, plaintiffs note that defendant Aftermath intervened in this action of its own accord (see Doc. No. 8), knowing that this was an action for copyright infringement in which damages discovery would involve "the complicated task of parsing [Aftermath's] documents and financial information (including sales and costs) to arrive at a net profit." Defendant Aftermath voluntarily came to this action and should not now be heard to complain of what discovery in copyright infringement actions necessarily entails.

Bifurcating the trial at this point would reward defendants' dilatory conduct. Plaintiffs' have filed a motion to compel, and defendants' have responded. Plaintiffs do not wish to waste the Court's time by rehashing this issue, but note that plaintiffs have been diligent in asking for damages discovery.

F. Defendants Have Not Shown Any Prejudice

The sum total of Defendant's argument that leaving the trial whole will prejudice them is:

> Eminem is one of the most popular recording artists in the world today. His songs have generated tremendous sales for Aftermath and Apple. The significant dollar figures associated with revenues from Eminem sound recordings could impact the factfinder's determination of liability, which is a reason why bifurcation is appropriate.

(Doc. No. 38, p. 16).

Case law cited by the Defendants in support of their motion is instructive of the sort of prejudice courts may consider when decided whether or not to bifurcate. For instance, *Gafford*, *Helminski,* and *Hines* were suits by individuals against corporations, and *Cravens* was a suit by an individual against a municipality. *Cravens v. County of Wood, Ohio*, 856 F.2d 753 (6th Cir. 1988); *Gafford v. General Electric Company*, 997 F.2d 150 (6th Cir. 1993); *Hines v. Joy Manufacturing Company*, 850 F.2d 1146 (6th Cir. 1988); *Helminski v. Ayerst Laboratories* 766 F.2d 208 (6th Cir. 1985).

The plaintiff in *Gafford* was suing for gender discrimination. The plaintiffs in *Cravens*, *Helminski* and *Hines* were severely injured individuals. The district courts, in their discretion, bifurcated liability and damages trials out of a concern that the juries would be overly sympathetic to the individual's point of view against faceless and wealthy defendants. *See, e.g., Cravens*, 856 F.2d at 755 (". . .there was substantial likelihood that the verdict of an un-bifurcated trial might be influenced by sympathy. . .").

No such risk exists in this case. All parties to this case are corporations and this case concerns, primarily, contract issues. Even if there were a jury hearing this case, there is little risk jurors would be moved by sympathy to side with the plaintiffs.

The logic of *in re: Bendectin Ligation* is equally inapplicable to this case. It involved not only extremely sympathetic plaintiffs (children with birth defects), but also "unusually large number of individual cases" – over 1100 separate claims. *In re: Bendectin Ligation,* 857 F.2d 290, 294 (6th Cir. 1988). With so many plaintiffs, each having discrete issues of exposure level and injuries, the utility of Rule 42(b) is more readily apparent: damages would have to be ascertained for each individual plaintiff based on exposure and injury level. With hundreds of plaintiffs, the case would amount to a superhuman task for any jury, and the court The present action has none of these individualized, fact-intensive damage calculations, which would need to be simplified for a finder of fact.

Finally, *Ellingson Timber Co. v. Great N. Ry. Co.* involved separating for trial two potentially dispositive affirmative defenses (statute of limitations and lack of subject matter jurisdiction) from an antitrust case. 424 F.2d 497 (9th Cir. 1970). Separation, in that case, saved both parties the costs of discovery, and did not give either party any substantive advantage or disadvantage, as the affirmative defenses could be heard completely with resort to any other part of the underlying case.

Further, no party in this case has requested a jury for this trial, and a bench trial would eliminate any risk of prejudice. For example, the Sixth Circuit has ruled that the "unfair prejudice" portion of Federal Rule of Evidence 403 is inapplicable in a bench trial. *United States v. Hall*, 2000 U.S. App. Lexis 170, at *6-*7 (6th Cir.) (citing *Gulf States Utilities Company v. Ecodyne Corporation*, 635 F.2d 517, 519 (5th Cir. 1981) ("*Rule 403* assumes a trial judge is able to discern and weigh improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision.")); *see also Shultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994) ("For a bench trial, we are confident that a district court can hear relevant evidence, weight its probative value and reject any improper inferences.").

The fear of prejudice contemplated by Federal Rule of Civil Procedure 42(b) is analogous to the situation under Federal Rule of Evidence 403. The Federal Rules presume that a party will suffer no prejudice from presenting relevant evidence to a judge. Defendants have not made any showing that the dollar values in the instant case are so great or outrageous that the Court needs to bifurcate liability and damages for its own good.

Finally, to the extent that defendants' claim of prejudice is based on the costs they might incur in producing the documents requested, plaintiffs note that defendants have made a claim for their costs in this lawsuit including attorneys fees in their answer. (Doc. No. 9 at 9). If defendants were able to prevail on liability, they would surely seek attorney's fees for their discovery costs.

IV. CONCLUSION

Plaintiffs respectfully request that this Court deny Defendants' Motion to Bifurcate Damages Discovery and Trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel.

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